

2010

# Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State

Marren Sanders

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

## Recommended Citation

Sanders, Marren (2010) "Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State," *William Mitchell Law Review*: Vol. 36: Iss. 2, Article 7.

Available at: <http://open.mitchellhamline.edu/wmlr/vol36/iss2/7>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

## CLEAN WATER IN INDIAN COUNTRY: THE RISKS (AND REWARDS) OF BEING TREATED IN THE SAME MANNER AS A STATE

Marren Sanders<sup>†</sup>

I. INTRODUCTION.....	534
II. THE CLEAN WATER ACT .....	535
A. <i>Background</i> .....	535
B. <i>“Treatment as a State” Provision</i> .....	537
C. <i>Devolution, Delegation, or Something Else Entirely?</i> .....	540
D. <i>The Bane of Jurisdiction</i> .....	542
E. <i>The Wisconsin Debacle</i> .....	545
III. MORE RISK THAN REWARD? .....	547
A. <i>Here Today, Gone Tomorrow?</i> .....	549
B. <i>Federal “Core” Standards</i> .....	550
C. <i>The Oklahoma Rider</i> .....	552
IV. REWARDS.....	553
V. WHAT CAN TRIBES DO? .....	555
A. <i>Institutional Capacity</i> .....	557
1. <i>Stable Institutions and Policies</i> .....	559
2. <i>Dispute Resolution and Separation of Politics</i> .....	560
3. <i>A Capable Bureaucracy</i> .....	560
4. <i>Cultural Match or Legitimacy</i> .....	561
5. <i>Strategic Orientation</i> .....	562
VI. CONCLUSION .....	563

---

<sup>†</sup> Marren Sanders is Curriculum Development Manager with the Native Peoples Technical Assistance Office at the University of Arizona where she develops certificate level distance learning courses on Indigenous law, policy, and governance for Native nations’ leaders and as continuing legal education for attorneys and other legal professionals. Dr. Sanders holds an LL.M. and S.J.D. (Doctorate in Law) in Indigenous Peoples Law and Policy and teaches Cultural Property at the UA James E. Rogers College of Law. She received her J.D. from Suffolk University Law School and a B.A. from the University of Vermont. Dr. Sanders would like to thank Sean Crane for his invaluable research assistance.

## I. INTRODUCTION

The Clean Water Act (CWA) was created to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”<sup>1</sup> CWA goals were to be carried out through government-to-government partnerships. However, like many environmental statutes, the CWA omitted discussion of Native nations, leaving the role of tribes under the Act unclear. This omission proved critical as reservations faced severe pollution concerns and prompted Congress to pass the “Treatment as States” (TAS) provision of the CWA in 1987.<sup>2</sup> However, to be treated like a state and set their own water quality standards (WQSs), Native nations must prove that they have a functioning tribal government with the authority and capacity to regulate.<sup>3</sup>

This article examines the TAS provision and the requirements that tribes must satisfy in order to exercise their sovereign right to environmental regulation within the reservation. TAS status carries with it enormous benefits or rewards, but also very real risks as tribes face legal and legislative uncertainty and jurisdictional challenges. Tribes considering taking the TAS step must critically evaluate their internal capacity to do so. They must be prepared to “hold . . . [their] own at the table.”<sup>4</sup> This means building expertise and management capabilities, so that their information and know-how is at least equal to, if not better than, non-Indian governments.<sup>5</sup> I conclude that there are many questions that must be answered by tribes who wish to successfully regulate clean water. Building infrastructure is not an easy task. However, for many tribes, the challenge may be worth the risks.

---

1. See U.S. ENVTL. PROT. AGENCY, *THE CHALLENGE OF THE ENVIRONMENT: A PRIMER ON EPA’S STATUTORY AUTHORITY* 13 (1972), *available at* <http://www.epa.gov/history/topics/fwpca/05.htm>.

2. 33 U.S.C. § 1377(e) (2006). See also U.S. ENVTL. PROT. AGENCY, *SURVEY OF AMERICAN INDIAN ENVIRONMENTAL PROTECTION NEEDS ON RESERVATION LANDS: 1986 v–viii* (1986) (finding major deficiencies in reservation water quality, management of solid and hazardous wastes, and treatment and disposal of wastewater).

3. 40 C.F.R. § 131.8(a)(1)–(2), (4) (2009).

4. STEPHEN CORNELL ET AL., *SEIZING THE FUTURE: WHY SOME NATIVE NATIONS DO AND OTHERS DON’T* 30 (The Harvard Project on American Indian Development 2005), *available at* <http://jopna.net>.

5. “[O]ut-administering, out-computing, and out-documenting non-Native counterparts have put the winning cards in Native communities’ hands.” *Id.* at 31.

## II. THE CLEAN WATER ACT

*All too often in the past, Congress has enacted broad national legislation without specifying the role to be played by Indian tribes vis-à-vis the Federal and State governments. That has led to a lot of uncertainty, confusion, and litigation and has hindered the execution of important national policies on the Nation's Indian reservations.*<sup>6</sup>

### A. Background

Recognizing the hazards of pollution and the threat that unclean water posed to public health and welfare, Congress enacted the Federal Water Pollution Control Act (FWPCA) in 1948 to “establish a national policy for the prevention, control and abatement of water pollution.”<sup>7</sup> FWPCA became the basic legal authority for Federal regulation of water quality; however, implementing the act proved to be ineffectual, and enforcement difficult.<sup>8</sup> As a result, FWPCA was amended in 1972 to restructure and consolidate authority for water pollution control in the Administrator of the Environmental Protection Agency.<sup>9</sup> The amended FWPCA became known as the “Clean Water Act” (CWA) and included the objective of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the nation's waters.”<sup>10</sup> CWA goals were to be carried out through federal-state partnerships, sometimes referred to as “environmental federalism.”<sup>11</sup> While the EPA is responsible for setting minimum WQSs for

6. COMM. ON ENV'T. & PUB. WORKS, ENV'T. & NATURAL RES. POLICY DIV. OF THE CONG. RESEARCH SERV. OF THE LIBRARY OF CONG., A LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987 (PUBLIC LAW 100-4) 487 (1988) (statement of Sen. Dan Inouye), microformed on CIS No. 88-S322-4 (Cong. Info. Serv.).

7. 33 U.S.C. § 1151 (1948), superseded by Pub. L. No. 92-500 § 2, 88 Stat. 816 (1972).

8. See *Env'tl. Prot. Agency v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202 (1976) (stating that FWPCA problems arose from standards focused on tolerable effects rather than preventable causes of water pollution, awkward sharing of federal and state responsibility for promulgating standards, and cumbersome enforcement procedures). See also U.S. ENVTL. PROT. AGENCY, *supra* note 2.

9. See U.S. ENVTL. PROT. AGENCY, *supra* note 2.

10. See *id.* at 13.

11. Dean B. Suagee & John P. Lowndes, *Due Process and Public Participation in Tribal Environmental Programs*, 13 TUL. ENVTL. L.J. 1, 3 (1999) (discussing tribal involvement in American environmental federalism, focusing on the CWA). See also James M. Grijalva, *The Origins of EPA's Indian Program*, 15 KAN. J.L. & PUB. POL'Y 191, 198 (2006) (stating structured federal-state partnership acknowledged both national interest in environmental management and states' historic responsibility over public health and welfare).

certain pollutants that all states must meet, states are free to set standards that are more stringent than the EPA requires.<sup>12</sup>

However, like many environmental statutes propagated in the 1970s, the CWA omitted Native nations, leaving the role of tribes under the act unclear. In the era of “self-determination,” invasions of tribal sovereignty under the guise of environmental law became increasingly likely as reservations faced severe pollution concerns.<sup>13</sup> In 1983, President Ronald Reagan issued the “American Indian Policy,” directing federal agencies to encourage tribal self-government, and the EPA became the first federal agency to adopt a formal Indian policy.<sup>14</sup> The policy recognized “[t]ribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs . . . consistent with Agency standards and regulations.”<sup>15</sup> The policy also stated, however, that the EPA would manage programs for reservations “[u]ntil Tribal Governments are willing and able to assume full responsibility” themselves.<sup>16</sup>

12. See generally 33 U.S.C. §§ 1313, 1370 (2006). Federal law sets minimum water quality criteria for certain toxic pollutants, but these are only issued as federal WQSs if a state’s standards are inadequate. See Dean B. Suagee, *The Supreme Court’s “Whack-A-Mole” Game Theory in Federal Indian Law, a Theory That Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90, 145 (2002) (explaining the “whack-a-mole” game theory in federal Indian law, identifying themes and techniques that the Court has used to reach results inconsistent with long-standing principles of federal Indian law, and suggesting the Court’s use of these themes and techniques have provided the Court a law-making role in Indian affairs).

13. Keith S. Porter, *Good Alliances Make Good Neighbors: The Case for Tribal-State-Federal Watershed Partnerships*, 16 CORNELL J.L. & PUB. POL’Y 495, 508 (2007) (discussing environmental regulation with a focus on the Clean Water Act and the need for coordination amongst jurisdictions); See U.S. ENVTL. PROT. AGENCY, *supra* note 2, at v–viii.

14. President’s Statement on American Indian Policy, PUB. PAPERS OF RONALD REAGAN 2 (Jan. 24, 1983) (“Tribal governments, like state and local governments, are more aware of the needs and desires of their citizens than is the Federal Government and should, therefore, have the primary responsibility for meeting those needs.”), available at <http://www.epa.gov/tribalportal/basicinfo/presidential-docs.html>; U.S. ENVTL. PROT. AGENCY, WORKING EFFECTIVELY WITH FEDERALLY-RECOGNIZED INDIAN TRIBES: A PRACTICAL GUIDE FOR EPA EMPLOYEES 2 (2000), available at <http://nepis.epa.gov/EPA/html/Pubs/pubtitle.htm>.

15. EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS 2 (Nov. 8, 1984), available at <http://www.epa.gov/tribalportal/pdf/indian-policy-84.pdf> (original in all capitals).

16. *Id.*

B. “Treatment as a State” Provision

*[W]ithout some modification, our programs, as designed, often fail to function adequately on Indian lands. This raises the serious possibility that, in the absence of some special alternative response by EPA, the environment of Indian reservations will be less effectively protected than the environment elsewhere. Such a result is unacceptable.*<sup>17</sup>

As a first step toward complying with its new Indian policy and to expressly open the door to tribes assuming full responsibility for clean water standards in Indian country, the CWA was amended in 1987, authorizing the EPA to “treat an Indian tribe as a State . . . to the degree necessary to carry out the objectives of” the Act.<sup>18</sup> The EPA was authorized to treat tribes as states for certain identified purposes, including (1) grants,<sup>19</sup> (2) water quality standards,<sup>20</sup> (3) nonpoint source management,<sup>21</sup> (4) National Pollutant Discharge Elimination System (NPDES) permits,<sup>22</sup> and (5) dredge and fill permits.<sup>23</sup> The “Treatment as a State” or “TAS” provision was a “prequalification” requirement that, once satisfied, allowed the qualifying tribe to become eligible to apply for these grants and program approvals.<sup>24</sup> Decisions as to whether a tribe qualified for TAS status were made on a case-by-case basis and the application process was onerous.<sup>25</sup> In

17. Grijalva, *supra* note 11, at 228 (quoting, in part, EPA Deputy Administrator Barbara Blum’s 1980 memorandum on Indian policy) (emphasis added).

18. 33 U.S.C. § 1377(e) (2006). *See also* Grijalva, *supra* note 11, at 255 (2006) (“Confusion, unpredictability, and the Agency’s failure to institutionalize the 1980 Indian Policy damaged the Agency’s credibility on Indian matters, and put pressure on EPA to take real action implementing any future agency-wide policy.”) (footnote omitted).

19. 33 U.S.C. §§ 1324, 1329, 1377(e)–(f) (2006).

20. *Id.* at § 1313.

21. *Id.* at § 1329.

22. *Id.* at § 1342.

23. *Id.* at § 1344.

24. Indian Tribes; Eligibility for Program Registration, 59 Fed. Reg. 64,339, 64,339 (Dec. 14, 1994).

25. *See* Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878 (Dec. 12, 1991) (to be codified at 40 C.F.R. pt. 131); Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After United States v. Lara*, 35 ENVTL. L. 471, 479 (2005) (describing application requirements as “likely to preclude many tribes from attaining TAS status, either because the tribe lacks the resources to devote to the lengthy application process or because the tribe cannot meet” statutory standards); *see also* Indian Tribes; Eligibility for Program Registration, 59 Fed. Reg.

1994, recognizing the TAS prequalification process as “burdensome, time-consuming and offensive to tribes,” the EPA combined TAS review into program approval applications.<sup>26</sup> While this eliminated a separate step in the process, the requirements of the TAS prequalification procedure must still be met. A tribe hoping to gain approval to administer WQSs must satisfy all of the following statutory conditions:

- The tribe must be federally recognized<sup>27</sup> and must be “exercising governmental authority over a Federal Indian reservation.”<sup>28</sup>
- The tribe must have “a governing body carrying out substantial governmental duties and powers.”<sup>29</sup>
- The functions exercised by the Indian tribe must pertain “to the management and protection of water resources which are . . . held by the Indian tribe . . . [or] held by the United States in trust for Indians . . . [or] held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation.”<sup>30</sup>
- The Indian tribe must be “reasonably” capable, in the “Administrator’s judgment, of carrying out the functions.”<sup>31</sup>

As a consequence, WQS approval applications must include statements that the tribe is federally recognized<sup>32</sup> and that describe the form and functions of the tribal government, including the tribal government’s source of authority for carrying out those functions.<sup>33</sup> The tribe must also submit a statement describing its authority to regulate water quality, including a map or legal description of the area over which it asserts such authority, a statement from the tribe’s

---

64,339, 64,340 (Dec. 14, 1994) (stating that a tribe may have jurisdiction over certain activities but not others and that, therefore, “the Agency must make a specific determination that a tribe has adequate jurisdictional authority and administrative and programmatic capability before it approves each tribal program”).

26. Indian Tribes Eligibility for Program Authorization, 59 Fed. Reg. 64,339 (Dec. 14, 1994).

27. 40 C.F.R. § 131.8(a)(1) (2009).

28. *Id.* at § 131.3(l).

29. *Id.* at § 131.8(a)(2).

30. *Id.* at § 131.8(a)(3).

31. *Id.* at § 131.8(a)(4).

32. *Id.* at § 131.8(b)(1).

33. *Id.* at § 131.8(b)(2). The tribal governing body must demonstrate that it “is currently carrying out substantial governmental duties and powers over a defined area.” *Id.*

legal counsel (or equivalent official) which describes the basis for the assertion of authority, and an identification of the surface waters for which the tribe proposes to establish WQSS.<sup>34</sup>

The application also requires that “[a] narrative statement describing the capability of the . . . Tribe to administer an effective water quality standards program” be submitted.<sup>35</sup> This statement must include a description of the “Tribe’s previous management experience;” “[a] list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations;” “[a] description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;” and “[a] description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program, or a plan which proposes how the tribe will acquire additional administrative and technical expertise.”<sup>36</sup> The plan must also address how the tribe will “obtain the funds to acquire the administrative and technical expertise.”<sup>37</sup>

Within thirty days of receipt, the “substance and basis of the Tribe’s assertion of authority to regulate the quality of reservation waters” is made available for notice and comment to “all appropriate governmental entities.”<sup>38</sup> If a conflicting or competing claim of jurisdiction is received, the Regional Administrator has the final decision as to whether or not “the Tribe has adequately demonstrated that it meets the requirements” of the applications.<sup>39</sup> However, the Agency “retain[s] authority to limit its approval of a tribal application to those land areas where the tribe has demonstrated jurisdiction.”<sup>40</sup>

---

34. *Id.* at § 131.8(b)(3).

35. *Id.* at § 131.8(b)(4).

36. *Id.* at § 131.8(b)(4)(i)–(v).

37. *Id.* at § 131.8(b)(4)(v). The regional administrator may also require additional documentation that he/she judges to be “necessary to support [the tribe’s] application.” *Id.* at § 131.8(b)(5).

38. *Id.* at § 131.8(c)(2)(i)–(ii).

39. *Id.* at § 131.8(c)(4). The functions exercised by the Indian tribe must pertain “to the management and protection of water resources which are” held by an Indian tribe, “held by the United States in trust for Indians,” “held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation.” *Id.* at § 131.8(a)(3).

40. Indian Tribes; Eligibility for Program Authorization, 59 Fed. Reg. 64,339, 64,340 (Dec. 14, 1994) (stating also that a tribe may have jurisdiction over certain activities but not others; therefore, the Agency must make a specific determination that a tribe has adequate jurisdictional authority, as well as administrative and



C. *Devolution, Delegation, or Something Else Entirely?*

*Assuming a tribal government can meet [TAS] criteria, when the EPA acts to turn over regulation of these environmental resources to the tribe, is it “devolving” this power to the tribe or merely “delegating” such authority? This . . . returns us to the question of whether tribes are inherent sovereigns or merely federal instrumentalities.*<sup>41</sup>

The scope of tribal authority over lands and resources has been debated, defined, and defended since the time of first contact with Europeans, and tribal authority under the CWA is no exception. David Wilkins, in his article *The Manipulation of Indigenous Status: The Federal Government as Shape-Shifter*, suggests that “devolution” refers to a program or issue being returned or “devolved” to tribes who held original power over it, while “delegation,” by contrast, indicates that tribes are “without any independent authority over the subject matter and are acting as . . . instrumentalities of the federal government.”<sup>42</sup> Throughout history, tribes’ inherent sovereign powers of jurisdiction over reservation lands, as well as over tribal members and non-member Indians, has generally been accepted, but authority over non-Indians and non-Indian land is often challenged.<sup>43</sup>

Joining the debate, scholars cannot seem to agree as to the source of tribal authority to set and enforce WQSs. While some argue that the TAS provision recognizes inherent tribal sovereignty over all waters within reservation boundaries,<sup>44</sup> others contend that the CWA delegated federal authority to tribes to exercise this power.<sup>45</sup> Still

---

programmatic capability, before it approves each tribal program).

41. David Wilkins, *The Manipulation of Indigenous Status: The Federal Government as Shape-Shifter*, 12 STAN. L. & POL’Y REV. 223, 231 (2001) (emphasis added) (discussing the treatment of tribes as states).

42. *Id.*

43. See, e.g., *Montana v. United States*, 450 U.S. 544, 565–66 (1981) (holding no civil regulatory jurisdiction over non-Indian activity on non-Indian lands within reservation unless non-Indian entered into consensual relationship with tribe or activity “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe”); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978) (holding no tribal criminal jurisdiction over non-Indian defendants).

44. See Jessica Owley, *Tribal Sovereignty Over Water Quality*, 20 J. LAND USE & ENVTL. L. 61, 62 (2004) (arguing that the TAS provision “exists to clarify tribal jurisdiction, not to create it”); Suagee, *supra* note 12, at 146.

45. See James M. Grijalva, *Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters*, 71 N.D.L. REV. 433, 444 (1995) (“The most potent source of tribal jurisdiction over non-Indians is federally-delegated power.”); Keith S. Porter, *Good Alliances Make Good Neighbors: The Case for Tribal-State-Federal Watershed Partnerships*, 16

others conclude that the CWA both devolves jurisdiction and is a delegation of power to tribes to regulate WQSs.<sup>46</sup> In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, the Supreme Court cited the CWA as an example of Congress expressly granting authority for environmental regulation to tribes;<sup>47</sup> however, the EPA took a different view.

Responding to comments that the CWA was not intended to expand the scope of tribal authority over non-Indians on the reservation, the EPA examined the Act's legislative history and found it to be "ambiguous and inconclusive" in regards to the scope of tribal authority.<sup>48</sup> Stating that it did not find that the statute "expands or limits . . . authority beyond that inherent in the Tribe," the EPA decided that the CWA was not a delegation of federal authority but rather "recognize[s] inherent Tribal civil regulatory authority to the full extent permitted under Federal Indian law."<sup>49</sup>

Adding to the ambiguity of tribal authority to set WSQ, however, the EPA also stated, "in light of the legislative history . . . the question of whether [the TAS provision] is an explicit delegation of authority

---

CORNELL J.L. & PUB. POL'Y 495, 515 (2007) ("[CWA] confers upon tribes a degree of sovereignty in preserving any culturally or historically significant use of the reservation waters."); Regina Cutler, Note, *To Clear the Muddy Waters: Tribal Regulatory Authority Under Section 518 of the Clean Water Act*, 29 ENVTL. L. 721, 741 (1999) (arguing that, under Chevron analysis, the plain meaning of the CWA, when read in context of legislative history, "indicates a clear congressional intent to delegate regulatory jurisdiction . . . to qualified tribes").

46. See Owley, *supra* note 44, at 101 ("A plain reading of the [CWA] shows both an acknowledgement of already existing tribal sovereignty and an unambiguous delegation of federal authority to tribes."); Judith V. Royster, *Oil and Water in the Indian Country*, 37 NAT. RESOURCES J. 457, 466 (1997) (stating that tribes generally have inherent authority to regulate waters in Indian country and should also, if they choose, be authorized by EPA to operate federal programs). But cf. Darren J. Ranco, *Models of Tribal Environmental Regulation: In Pursuit of a Culturally Relevant Form of Tribal Sovereignty*, FED. LAW., Mar.-Apr. 2009, at 46, 48 ("TAS status . . . appears to augment the authority of tribes but, in fact, diminishes tribal sovereignty.").

47. 492 U.S. 408, 428 (1989).

48. Amendments to Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,880 (Dec. 12, 1991) (to be codified at 40 C.F.R. pt. 131).

49. *Id.* See also Tweedy, *supra* note 25, at 478 (stating EPA's presumption appears "consistent with Congressional intent, as manifested in the language of the CWA"). But cf. Dean B. Suagee, *Indian Tribes and the Clean Water Act*, A.B.A. TRENDS, Jan.-Feb. 2005, at 4, 5 (arguing that express delegation of federal authority to tribes would help "fill the gap in the regulatory program of the CWA that results from the lack of EPA-approved WQS" in Indian country because tribes could adopt WQSs "without worrying about lawsuits challenging their authority").

over non-Indians is not resolved.”<sup>50</sup> The Agency:

[P]resumes that, in general, Tribes are likely to possess the authority to regulate activities affecting water quality on the reservation . . . [but it] does not believe . . . that it would be appropriate to recognize Tribal authority and approve [TAS] requests [without] verifying documentation . . . [and] an affirmative demonstration of their regulatory authority.<sup>51</sup>

In essence, under the TAS provision, tribes have authority to set WQSs only if they already have the authority to do so.

#### D. *The Bane of Jurisdiction*

*Tribal jurisdiction is politically controversial, legally multifaceted, and defined in case law whose continually evolving principles are rife with ambiguity.*<sup>52</sup>

As often happens when tribes dare to regulate, disputes over jurisdiction with non-Indians, particularly with state governments, inevitably occur. “Jurisdictional battles make environmental regulation in Indian country difficult [because] no sovereign—federal, state, or tribal—wants to relinquish any of its authority.”<sup>53</sup> The EPA has complicated matters by stating that tribes are the “primary parties for setting standards, making environmental policy decisions and managing programs for reservations,”<sup>54</sup> while also stating that it will authorize environmental program management to the government—state or tribal—that can demonstrate adequate jurisdiction throughout the reservation.<sup>55</sup> U.S. Supreme Court decisions make it even harder for Native nations to determine whether tribal authority to

50. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,881 (Dec. 12, 1991) (to be codified at 40 C.F.R. pt. 131).

51. *Id.*

52. David F. Coursen, *EPA’s New Tribal Strategy*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10,643, 10,647 (2008) (footnotes omitted) (discussing tribal jurisdiction).

53. Marren Sanders, *Ecosystem Co-Management Agreements: A Study of Nation Building or a Lesson on Erosion of Tribal Sovereignty?*, 15 BUFF. ENVTL. L.J. 97, 114 (2008) (examining tribal sovereignty and resource management in the era of environmental self-determination via the Cornell/Kalt model of “nation building” in Indian country).

54. EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS, *supra* note 15, at 2.

55. Memorandum from the Adm’r of U.S. EPA, Federal, Tribal, and State Roles in the Prot. and Regulation of Reservation Env’ts (July 10, 1991) (on file with author).

regulate will be upheld. A number of cases have steadily eroded this authority, particularly in regards to tribal jurisdiction over non-Indian lands located within reservation boundaries.<sup>56</sup>

In *Montana v. United States*,<sup>57</sup> the Court held that the Apsáalooke Nation (Crow Tribe) may regulate non-Indian activity on non-Indian lands within the reservation only if the non-Indian entered a consensual relationship with the tribe or its members,<sup>58</sup> or the activity “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>59</sup> Also, in *Brendale v. Confederated Tribes*, a no-majority opinion held that county zoning authority controlled non-Indian fee land in the “open” area of the Yakima reservation, but tribal zoning laws governed non-Indian fee land in the “closed” area.<sup>60</sup>

Tribal WQS programs seem to be spared at least some of this jurisdictional confusion. While the EPA holds that it “retain[s] authority to limit its approval of a tribal application to those land areas where the tribe has demonstrated jurisdiction,”<sup>61</sup> the agency has also expressly stated that water management is absolutely crucial to the survival of many Indian reservations and that a “checkerboard” system of regulation, such as that endorsed by the *Brendale* opinion, “would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing [the] standards.”<sup>62</sup>

In addition, lending strong support for the proposition that tribal WQS programs satisfy the second *Montana* exception, the EPA recognizes that “water quality management serves the purpose of protecting public health and safety, which is a core governmental

---

56. See, e.g., *Montana v. United States*, 450 U.S. 544 (1981).

57. *Id.*

58. *Id.* at 565. For example, through commercial dealing, contracts, leases, or other arrangements. *Id.*

59. *Id.* at 566.

60. *Brendale v. Confederated Tribes*, 492 U.S. 408, 432, 444 (1989).

61. Indian Tribes; Eligibility for Program Authorization, 59 Fed. Reg. 64,339, 64,340 (Dec. 14, 1994).

62. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878 (Dec. 12, 1991) (to be codified at 40 C.F.R. pt. 131). See also Daniel I.S.J. Rey-Bear, Note, *The Flathead Water Quality Standards Dispute: Legal Bases for Tribal Regulatory Authority over Non-Indian Reservation Lands*, 20 AM. INDIAN L. REV. 151, 213 (1996) (stating that to properly regulate the quality of water that flows through their lands, tribes must be able to regulate what enters their reservations from beyond those areas).

function, whose exercise is critical to self-government.”<sup>63</sup> In response to *Brendale*, the EPA adds that “[b]y contrast, the power to zone can be exercised to achieve purposes which have little or no direct nexus to public health and safety.”<sup>64</sup>

To date, no dispute regarding tribally regulated WQSs has reached the Supreme Court; however, a number of cases have reached circuit courts of appeal. *City of Albuquerque v. Browner* was the first case challenging WQSs set by a tribe under the TAS provision.<sup>65</sup> The City of Albuquerque’s waste treatment facility discharged into the Rio Grande River upstream of the Isleta Pueblo.<sup>66</sup> Albuquerque filed suit when the EPA tried to revise the city’s NPDES permit to meet the Pueblo’s WQS, which were more stringent than federal and New Mexico standards.<sup>67</sup> The court upheld the EPA’s reading of the CWA as recognition of inherent tribal regulatory authority, concluding that the Pueblo could “establish [WQSs] that are more stringent than those imposed by the federal government . . . because it is in accord with powers inherent in Indian tribal sovereignty.”<sup>68</sup> The court also held that the EPA could require upstream NPDES dischargers, such as Albuquerque, to comply with downstream tribal standards.<sup>69</sup>

In *Montana v. EPA*, the State of Montana challenged the EPA’s grant of TAS status to the Confederated Salish and Kootenai Tribes, which allowed the tribes to establish WQSs for the Flathead Indian Reservation.<sup>70</sup> Several non-tribal facilities owned by the state, county, and municipalities engaged in regulated discharges pursuant to existing NPDES permits on non-Indian fee land within the reservation.<sup>71</sup> The court upheld the EPA’s approval of the tribes’ TAS status based on the second *Montana* exception and determined that the EPA was correct in finding that the “activities of the non-members posed such serious and substantial threats to Tribal health and welfare that Tribal regulation was essential.”<sup>72</sup> It concluded that the EPA’s granting of TAS authority was “valid [and] reflect[ed] appropriate

63. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,879 (Dec. 12, 1991).

64. *Id.*

65. 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997).

66. 97 F.3d at 419.

67. *Id.*

68. *Id.* at 423.

69. *Id.* at 424.

70. 137 F.3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998).

71. 137 F.3d at 1139.

72. *Id.* at 1141.

delineation and application of inherent Tribal regulatory authority over non-consenting non-members.”<sup>73</sup>

The most recent circuit decision involving the EPA’s approval of a tribe for TAS status is *Wisconsin v. EPA*.<sup>74</sup> There, the state of Wisconsin argued that, under the Equal Footing Doctrine, it held title to certain submerged lands within the Mole Lake Reservation, and was therefore the proper sovereign to regulate WQSs for those water bodies.<sup>75</sup> Noting that the Equal Footing Doctrine “cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause,”<sup>76</sup> the court held that the EPA’s grant of TAS status to the Mole Lake Band of Lake Superior Chippewa Indians was “not arbitrary, unreasonable, or contrary to law.”<sup>77</sup> Consistent with the purposes of the CWA and the principles of *Montana*’s second exception, “the Band ha[d] demonstrated that its water resources were essential to its survival.”<sup>78</sup> Therefore, “it was reasonable for the EPA . . . to allow the [Band] to regulate water quality on the reservation, even though that power [included] some authority over off-reservation activities.”<sup>79</sup>

#### E. *The Wisconsin Debacle*

*Congressional specialists have limited vision. They work their own committees and police their specialized turfs happily oblivious to the outside world. Their intense ideologies find comfort in steering clear of complicated matters that promise only unwelcome entanglements.*<sup>80</sup>

The Oneida Tribe of Wisconsin became one of the first tribes granted TAS under the CWA, and in 1996 the EPA approved the tribe’s WQS.<sup>81</sup> During the discovery phase of *Wisconsin v. EPA*,

73. *Id.*

74. 266 F.3d 741 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002).

75. 266 F.3d at 746.

76. *Id.* at 747 (quoting *Arizona v. California*, 373 U.S. 546, 597–98 (1963)).

77. *Id.* at 750.

78. *Id.*

79. *Id.*

80. William H. Rodgers, Jr., *Treatment as Tribe, Treatment as State: The Penobscot Indians and the Clean Water Act*, 55 ALA. L. REV. 815, 816 (2004) (discussing the 1976 Resource Conservation and Recovery Act which Rodgers argues wrongfully defined tribes as municipalities).

81. Jennifer Hill-Kelley, *Restoring the Reservation, Sustaining Oneida*, 21 NAT. RESOURCES & ENV’T 21, 21 (2007) (discussing the success of the Oneida Environmental, Health, and Safety Division).

evidence came to light that EPA officials falsified and backdated documents supporting the Oneida, Menominee, and Lac du Flambeau TAS approvals.<sup>82</sup> Once exposed, the Oneida and Lac du Flambeau TAS approvals were rescinded and two EPA officials were indicted by a federal grand jury.<sup>83</sup> Eventually, the lawsuits were dismissed and the EPA was ordered to pay the state \$369,000 in attorney's fees and court costs.<sup>84</sup>

It comes as no surprise that, in 1998, one year after cancelling Oneida and Lac du Flambeau TAS status, the EPA revised its strategy for TAS approvals. Among other goals, the EPA aimed to "improve . . . legal defensibility of [their] decisions regarding tribal programs"<sup>85</sup> and adopted a recommendation that "appropriate governmental entities" be given the opportunity to comment on a tribe's assertion of jurisdiction over non-Indians on fee land in its initial TAS application.<sup>86</sup> According to David Coursen, this policy not only makes the TAS process more time-consuming but also "effectively gives [state governments] two opportunities to comment on tribal jurisdiction."<sup>87</sup> As a result, tribal governments applying for TAS status may be exposed to challenges that risk their sovereign ability to protect their lands and natural resources as well as their relationship with the federal government.

82. Bonner R. Cohen, *EPA Official Pleads Guilty in Fraud Case*, ENV'T & CLIMATE NEWS, Sept. 1, 2000, available at [http://www.heartland.org/policybot/results/9665/EPA\\_official\\_pleads\\_guilty\\_in\\_fraud\\_case.html](http://www.heartland.org/policybot/results/9665/EPA_official_pleads_guilty_in_fraud_case.html). These challenges to TAS approval were consolidated into the *Wisconsin v. EPA* case when it was first filed. Paul M. Drucker, *Wisconsin v. EPA: Tribal Empowerment and State Powerlessness Under § 518(E) of the Clean Water Act*, 5 U. DENV. WATER L. REV. 323, 379 n.342 (2002) (reviewing *Wisconsin v. EPA* and discussing its repercussions for nationwide water pollution regulation). The case proceeded regarding only the Mole Lake Band's application as the investigation revealed that it was not affected by the allegations. *Id.*

83. Indianz.com, *EPA Attorney Pleads Guilty*, <http://www.indianz.com/News/show.asp?ID=lead/6282000> (last visited December 29, 2009). The Menominee voluntarily withdrew their "Treatment as a State" (TAS) application and Marc Radell, the Associate Regional Counsel of the EPA, pleaded guilty to contempt of court. Cohen, *supra* note 82. Claudia Johnson, Region V Tribal Coordinator and Program Manager, passed away from cancer before the disposition of the case against her. *Id.*

84. Indianz.com, *supra* note 83.

85. Memorandum from Robert Perciasepe, Assistant Administrator, U.S. EPA & Jonathan Cannon, General Counsel, U.S. EPA to EPA Administrators 3 (Mar. 19, 1998) (on file with author).

86. *Id.*

87. Coursen, *supra* note 52, at 10,646.

### III. MORE RISK THAN REWARD?

*No state that brings a lawsuit runs serious risk that a court might hold that the state does not exist, that its territory is but a fraction of that imagined[,] . . . [t]hat its founding documents are a fraud, that its chairman was not properly chosen, or that its lawmakers are common miscreants made readily answerable for their errors. Tribes, by contrast, are exposed to these risks all the time.*<sup>88</sup>

Alex Tallchief Skibine writes that TAS status “allows Indian tribes to extend the reach of their sovereignty beyond the reservation borders.”<sup>89</sup> Unfortunately, of the 562 federally recognized tribes in the United States, only 45 have been granted TAS status to date, with only 34 gaining approval for their WQS.<sup>90</sup> Scholars vary as to the reasons for these disappointing numbers. One of the realities that tribes must consider is the text of the TAS provision itself. First and foremost, the tribe must be “federally recognized,” and the WQS program must concern the management and protection of water resources defined by land location and ownership.<sup>91</sup> Both of these requirements automatically exclude many tribes from qualifying.<sup>92</sup> Additionally, the history of federal, tribal, and state relations is replete with conflict. Tribes opting to enact their own WQSs are often

88. Rodgers, *supra* note 80, at 823.

89. Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003, 1022 (2008) (arguing that Indian tribes venturing beyond the reservation should still be vested with at least some attributes of sovereignty).

90. See U.S. EPA, Indian Tribal Approvals for the Water Quality Standards Program, <http://www.epa.gov/waterscience/tribes/approvable.htm> (last visited Nov. 5, 2009). The Confederated Tribes of the Colville Reservation requested that the EPA promulgate federal WQSs for the reservation. Water Quality Standards for the Colville Indian Reservation in the state of Washington, 54 Fed. Reg. 28,622, 28,622 (July 26, 1989) (codified at 40 C.F.R. pt. 131).

91. 40 C.F.R. § 131.8(a) (1) (2009). WQSs must pertain to water resources within the borders of an Indian reservation and be 1) held by the Indian Tribe; 2) held by the United States in trust for Indians; 3) held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation; or 4) otherwise within the borders of the Indian reservation. *Id.* at § 131.8(a) (3).

92. See James M. Grijalva, *Where Are the Tribal Water Quality Standards and TMDLs?*, 18 NAT. RESOURCES & ENV'T 63, 67 (2003) (holding because only 1 of 229 tribes in Alaska has a reservation, number of tribes potentially eligible for TAS under the CWA is severely diminished). See also Tweedy, *supra* note 25, at 480 (stating tribes should not be denied TAS status because they lack a treaty or other federal documentation demonstrating their sovereign authority).



confronted with expensive time-consuming litigation.<sup>93</sup>

Cases like *Montana v. EPA* uphold tribal sovereignty to set WQSs, but only to the extent that its authority to do so is recognized by, and its minimum standards comply with, the EPA.<sup>94</sup> Non-Indians are particularly sensitive to environmental regulation and often see it as an intrusion on state authority.<sup>95</sup> For example, when the Penobscot and Passamaquoddy tribes requested stricter levels for dioxin in regards to NPDES permits issued to pulp mills whose discharges affected the tribe's aboriginal rivers and fisheries, the mills responded by requesting an "information raid" designed to obtain the "entire documentary story pertaining to Maine tribes and natural resources."<sup>96</sup> Winning the right to litigate in state court,<sup>97</sup> the mills demanded to inspect documents pursuant to the Maine Freedom of Access Act.<sup>98</sup> The mills sought materials related to the tribes' alleged authority to regulate water resources within or adjacent to Indian territory, its efforts to obtain TAS status, and its efforts to have the EPA adopt WQSs different from state standards.<sup>99</sup>

The tribes moved to dismiss based on the Maine Indian Claims Settlement Act, which states that "internal tribal matters" were not

93. See Ranco, *supra* note 46, at 46 (holding a tribal program resembling federal or state WQSs is more likely survive litigation, but the more the program reflects tribal values, the greater the risk to tribal sovereignty). See also Denise D. Fort, *State and Tribal Water Quality Standards Under the Clean Water Act: A Case Study*, 35 NAT. RESOURCES J. 771, 772 (1995) (stating TAS provision increases the potential ten-fold for tribal and state jurisdictional conflicts).

94. See Ranco, *supra* note 46, at 48 (stating that circuit court cases can be viewed as an example of federal efforts to limit tribal sovereignty and prevent tribes from making meaningful authoritative decisions).

95. See e.g., Grijalva, *supra* note 11, at 199–200 (stating that the "EPA's existence was a constant reminder of the public's lack of confidence in state governments' ability and willingness to protect human health and the environment. . . . Suddenly, with little warning, and certainly without consultation states found themselves bound to respect (and implement) federal mandates in a subject area they formerly governed with little outside interference."); see also Grijalva, *supra* note 92, at 68 (holding state officials see any exercise of tribal or federal power within state borders as an infringement on state expectation of complete sovereignty).

96. Rodgers, Jr., *supra* note 80, at 837.

97. *Id.* Under the "well-pleaded complaint rule," the federal court dismissed the case as it was based on a state "freedom of access" lawsuit, whose defense was that it would intrude upon federally protected tribal sovereignty. *Penobscot Nation v. Georgia-Pacific Corp.*, 106 F. Supp. 2d 81, 82–83 (D. Me. 2000).

98. ME. REV. STAT. ANN. tit. 1, §§ 401–452 (Supp. 2009).

99. *Great N. Paper, Inc. v. Penobscot Indian Nation*, No. CIV.A. CV-00-329, 2000 WL 33675350, at \*1 (D. Me. Sept. 19, 2000).

subject to regulation by the state.<sup>100</sup> The court concluded that the record production would not interfere with internal tribal matters because “[a]ny efforts by the Tribes to regulate water resources, obtain ‘treatment as a State’ status, or adopt water standards different from those of Maine would impair Maine’s interest in pollution control.”<sup>101</sup> The tribes did not have TAS status, but “the very fear of it was reason enough to approve this corporate raid on tribal documents.”<sup>102</sup> As William Rogers states, “[The] [r]efusal of the federal courts to protect [these tribes] underscores why ‘treatment as state’ in the federal environmental laws requires a further battery of legal protection.”<sup>103</sup>

A. *Here Today, Gone Tomorrow?*

Legal protection for tribal sovereignty has waxed and waned throughout the history of federal-tribal relations. During the 1970s, at the same time as the creation of the EPA and the CWA amendments, the era of “self-determination” was being promoted by Congress and the Executive.<sup>104</sup> The Supreme Court, however, began to systematically limit tribal sovereignty, including the right of tribal governments to regulate non-Indians within the reservation.<sup>105</sup> While *Albuquerque v. Browner*, *Montana v. EPA*, and *Wisconsin v. EPA* uphold tribal sovereignty to regulate, tribes must keep in mind that the mechanism for doing so was predicated on current federal Indian law and the EPA’s

100. See ME. REV. STAT. ANN. tit. 30, § 6206(1) (Supp. 2009).

101. *Great N. Paper*, 2000 WL 33675350, at \*4.

102. Rodgers, Jr., *supra* note 80, at 842.

103. *Id.* at 844. See also Drucker, *supra* note 82, at 376 (stating “a whole new saga in the storied water battles of the West may find a stage in [a TAS provision] of the CWA”).

104. See President’s Message to Congress Transmitting Recommendations for Indian Policy, H.R. DOC. NO. 91-363 (1970). President Nixon officially ended the Termination Era and urged Congress to adopt legislation providing for greater tribal autonomy and control of their people, lands, and resources. *Id.* His recommendations led to the new “self-determination” policy and passage of the Indian Self-Determination and Education Assistance Act of 1975, which provided, for the first time, that tribal programs, while funded by the federal government, could be planned and administered by the tribes themselves. See 25 U.S.C. §§ 450a–450n (2006).

105. See, e.g., *Montana v. United States*, 450 U.S. 544, 566 (1981) (holding that there was no civil regulatory jurisdiction over non-Indian activity on non-Indian lands within a reservation unless the non-Indian entered into a consensual relationship with tribe or the activity “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe”).

approval of tribal authority and WQs.<sup>106</sup>

For example, Anna Fleder and Darren Ranco argue that TAS status “appears to augment the authority of tribes but in fact diminishes tribal sovereignty . . . [by] maintain[ing] that [tribes] must fix WQs as a state, rather than as a nation, in accordance with federal laws.”<sup>107</sup> Other scholars agree that “the threat of a ‘civil-Oliphant’—a flat rule prohibiting any tribal civil regulation of non-Indians in Indian country—is very real.”<sup>108</sup> The EPA continues to reaffirm its commitment to “build a strong partnership with tribal governments to protect human health and the environment in Indian country.”<sup>109</sup> However, tribes must balance the desire to promulgate standards based on cultural and traditional needs and decision making with the realities of potentially changing federal policy and regulation.

#### B. Federal “Core” Standards

*Beware of Congressional gifts to Indian tribes.*<sup>110</sup>

Living up to the federal government’s reputation for changing

106. See *Ariz. Pub. Serv. Co. v. E.P.A.*, 211 F.3d 1280, 1292 (D.C. Cir. 2000) (“EPA’s interpretation of the [CWA] never has been subject to judicial review on the question of the presence or absence of an express delegation to tribes to regulate fee lands within the bounds of reservations.”). See also Raymond Cross, *Tribes as Rich Nations*, 79 OR. L. REV. 893, 934–35 (2000) (stating EPA fundamentally undermines tribal environmental self-determination by expressly incorporating the *Montana* exception and *Brendale*’s “serious and substantial” impact into basis for tribal regulation). Cf. Drucker, *supra* note 82, at 379–80 (noting that grant of TAS status by EPA is virtually guaranteed, because “the Agency’s institutional predisposition is to encourage tribal applications for TAS status and, once received, make sure they are approved”).

107. Anna Fleder & Darren J. Ranco, *Tribal Environmental Sovereignty: Culturally Appropriate Protection or Paternalism?*, 19 J. NAT. RESOURCES & ENVTL. L. 35, 44–45 (2004) (noting that the Isleta Pueblo obtained permission to adopt standards under a clean water law it did not devise and could not change, that the standards were subject to review by a federal agency, and that only the agency could enforce standards).

108. Grijalva, *supra* note 92, at 68. See also Ranco, *supra* note 46, at 48 (arguing tribal-EPA relationship “rests on two rather dangerous assumptions: that agencies will always decide in favor of tribes . . . and that reviewing courts will always defer to agencies’ decisions”). But see Drucker, *supra* note 82, at 388 (concluding *Wisconsin v. EPA* decision makes state opposition to granting of TAS status and tribal WQs futile).

109. Memorandum from Lisa P. Jackson, EPA Adm’r (July 22, 2009), available at <http://www.epa.gov/tribalportal/pdf/reaffirmation-memo-epa-indian-policy-7-22-09.pdf>.

110. Rodgers, Jr., *supra* note 80, at 817.

Indian policy, in 2001, the EPA proposed a new rule to implement “core” federal WQSs in Indian country.<sup>111</sup> Though withdrawn a few days later, so that the new administrator could review it, another round of consultation regarding core federal WQSs was proposed in 2004.<sup>112</sup> Significantly, the EPA stated that, although its preference is that tribes develop and adopt their own WQSs, the agency nonetheless “does not expect that the proportion of Tribes seeking EPA approval of water quality standards under the Clear Water Act will increase significantly in the near future.”<sup>113</sup> The proposed core standards would apply to tribes that have not established approved WQSs and to those that have not opted out by affirmatively proving that they have a plan, or intend to develop a plan, for establishing WQSs “within a reasonable amount of time.”<sup>114</sup>

For some tribes, imposition of core standards by the EPA may be the best choice, but for others the proposal is an affront to sovereignty.<sup>115</sup> Recognizing this possibility, the Haudenosaunee Environmental Task Force found the proposal well-meaning but paternalistic.<sup>116</sup> Absent traditional knowledge and law, the one-size-fits-all standards

---

111. “Indian country,” as used in Chapter 18 of the United States Code, is defined as

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2006).

112. See *Interim Draft Outreach and Consultation Plan: Federal Water Quality Standards for Waters in Indian Country* 2 (Jan. 29, 2004) (on file with author).

113. *Federal Water Quality Standards for Indian Country; Proposed Rule 4* (Jan. 18, 2001) (unofficial pre-publication copy of the proposed rule), available at <http://www.epa.gov/waterscience/tribes/files/proposedcore2001.pdf>.

114. *Id.*

115. For example, the Confederated Tribes of the Colville Reservation requested that the EPA promulgate federal WQSs for their reservation. *Water, Quality Standards for the Colville Indian Reservation in the State of Washington*, 54 Fed. Reg. 28,622, 28,622 (July 6, 1989) (codified at 40 C.F.R. pt. 131).

116. Haudenosaunee Environmental Task Force Response, *Core Water Quality Standards for Indian Country Waters Without EPA-Approved Tribal Standards* (on file with author) (finding “opt-out” approach disrespectful and an intrusion on sovereignty). But see Suagee, *supra* note 12, at 149 (arguing tribes should support core proposal because ongoing lack of approved WQSs on reservations is invitation for states to assert their WQSs).

would “fail to protect [Native nations’] unique concerns and cultural needs [and] further promote assimilation” by the dominant society.<sup>117</sup> The proposed core standards rule has never been published but remains on the books.<sup>118</sup> It may only be a matter of time before it is enacted or some other form of legislation gives tribes no other choice regarding clean water on the reservation.

### C. *The Oklahoma Rider*

*[The] revival of water pollution law in Indian country is not universally admired. In fact, it is frequently resented. Each and every tribal delegation runs into stiff opposition—invariably from an offended state, often from polluters who have prospered in the shadows of the status quo.*<sup>119</sup>

Giving tribes no other choice is exactly what happened when the Pawnee Nation of Oklahoma gained TAS status and WQS program approval in 2004.<sup>120</sup> Not surprisingly, a lawsuit was filed by the state challenging the EPA’s decision, and Oklahoma Senator James Inhofe, Chairman of the Senate Environmental and Public Works Committee, requested an investigation into the handling of TAS applications in the state.<sup>121</sup> What came as a surprise, not only to the tribe but also to the EPA and the Governor of Oklahoma, was a midnight rider attached to a transportation bill after the House and Senate had agreed on the bill’s final version.<sup>122</sup>

117. Haudenosaunee Environmental Task Force Response, *supra* note 116. *But see* Kathleen A. Kannler, Note, *The Struggle Among the States, the Federal Government, and Federally Recognized Indian Tribes to Establish Water Quality Standards for Waters Located on Reservations*, 15 GEO. INT’L ENVTL. L. REV. 53, 64 (2002) (arguing it is in tribes’ best interests to have federal government specify WQSs because many do not have resources to develop their own individual programs).

118. *See Proposed Rule 4*, *supra* note 113.

119. Rodgers, Jr., *supra* note 80, at 820 (emphasis added).

120. *See* Letter from Richard E. Greene, Reg’l Adm’r. to George Elton Howell, President, Pawnee Nation of Okla. (Nov. 3, 2004), *available at* [http://epa.gov/region6/water/ecopro/watershd/standard/pawnee-approval\\_decision.pdf](http://epa.gov/region6/water/ecopro/watershd/standard/pawnee-approval_decision.pdf). The EPA approved the Pawnee application only insofar as it pertained to tribal trust lands. *Id.* TAS status was not approved for member allotments and other lands because the Nation had not demonstrated “adequate authority for CWA program authorization” over those areas. *Id.*

121. Indianz.com, EPA Case on Tribal Sovereignty Attracts Attention, <http://www.indianz.com/News/2005/008611.asp> (last visited Dec. 29, 2009).

122. Anthony Thornton, *Indian Leaders Hear Complaints About Legislation*, THE OKLAHOMAN, Nov. 2, 2005, at 11A (statement of Chad Smith, principal chief of the Cherokee Nation: “The only people who knew about [the amendment] were Senator Inhofe and the Oklahoma Independent Petroleum Association.”).

Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005.<sup>123</sup> Tucked away in subtitle B “Other Miscellaneous Provisions” is a short paragraph essentially stating that if Oklahoma gains approval to run state environmental programs, the EPA, on request of the state, must approve administration of the state program in Indian country located within the state “without any further demonstration of [state] authority.”<sup>124</sup> The act also provides that the EPA may treat an Oklahoma tribe as a state only if, in addition to satisfying federal TAS requirements, the tribe and the state enter into a cooperative agreement. Oklahoma must agree to “treatment of the Indian tribe as a State and to jointly plan administer program requirements.”<sup>125</sup>

As the legal battle over the Pawnee Nation’s TAS status ended, non-Indian sentiment for the amendment was generally favorable.<sup>126</sup> The rider was viewed by the tribes as “the most scary, direct, take-the-gloves-off-and-go-for-the-jugular attack on tribal sovereignty” ever seen.<sup>127</sup> In making the decision to pursue a WQS program, tribal governments must balance the reality of opposition, such as that exemplified by the Oklahoma rider, with the certainty of benefits that may be gained with TAS status.

#### IV. REWARDS

*[N]o activity on the reservation has more potential for significantly affecting the economic and political integrity and the health and welfare of all reservation citizens than water use, quality, and regulation.*<sup>128</sup>

Clean water is essential to many tribes, not just as a source of sustenance, but also for cultural, medicinal, and spiritual reasons. For

123. Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005, Pub. L. No. 109-59, 119 Stat. 1144 (2005).

124. *Id.* § 10211(a) at 119 Stat. 1937.

125. *Id.* § 10211(b)(2) at 119 Stat. 1937.

126. See Editorial, *Reasonable*, TULSA WORLD, Aug. 11, 2005, at A12, available at 2005 WLNR 24859949 (stating tribally-developed standards for environmental matters would have led to unneeded layers of bureaucracy). See also Editorial, *Filling the Bill: Inhofe’s Sage Rider Targets Tribes*, THE OKLAHOMAN, Aug. 11, 2005, at 6A, available at 2005 WLNR 24823033 (comparing Inhofe’s tactics to sausage making; “unsavory, but the results could be quite tasty”).

127. Thornton, *supra* note 122 (statement of Lee Price, attorney for the Pawnee Nation).

128. Jana L. Walker & Susan M. Williams, *Indian Reserved Water Rights*, NAT. RESOURCES L. MANUAL 433, 437 (Richard J. Fink ed., 1995).

example, the Hualapai use ponderosa pine needles and water from the San Francisco Peaks to aid women in childbirth, and pure spring water is used in Havasupai sweat lodges as part of their religious practices.<sup>129</sup> The EPA requires that, at a minimum, WQSs include designated water uses, in-stream criteria to protect these uses, and an anti-degradation policy.<sup>130</sup> Certainly, the most obvious benefits or rewards for tribes gaining TAS status and WQS program approval is their ability to maintain some measure of local control over water quality on the reservation and to include standards that reflect traditional, cultural, and ceremonial needs.<sup>131</sup>

Other advantages for tribes with TAS status include the prospect of developing their own NPDES permit systems and receiving funding directly from the federal government.<sup>132</sup> In addition, tribal WQSs can reduce the “checkerboard” environmental jurisdictional pattern within reservations and strengthen federal-tribal government-to-government relationships, allowing tribes a greater opportunity to influence federal environmental regulatory policy and processes.<sup>133</sup> Tribal standards can not only directly regulate pollution within the reservation, but also give tribes rights against upstream discharges that may affect water quality within reservation borders.

For example, a tribe with federally approved WQSs can challenge and sometimes “veto” the issuance of federal permits. All applicants

129. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1102 (9th Cir. 2008) (en banc).

130. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876 (Dec. 12, 1991) (to be codified at 40 C.F.R. pt. 131).

131. For example, the Isleta Pueblo included “Primary Contact Ceremonial Use” as a designated use of the Rio Grande River within the boundaries of the reservation. *City of Albuquerque v. Browner*, 97 F.3d 415, 428 (10th Cir. 1996). *See also* Grijalva, *supra* note 45, 462–63 (stating tribal WQSs give tribes federally-enforceable regulatory power to prohibit non-Indian activities on fee lands that risk unacceptable degree of harm to tribal water quality).

132. *See* 33 U.S.C. § 1377(e) (2007).

133. Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,878 (Dec. 12, 1991) (to be codified at 40 C.F.R. pt. 131) (stating checkerboard system of regulation, where tribe and state split up regulation of water quality on reservation, ignores difficulties of two different sovereign entities establishing standards for same stream segments). *See also* *Montana v. U.S. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998) (holding EPA regulations granting TAS authority are valid as reflecting appropriate delineation and application of inherent tribal regulatory authority over non-consenting non-members); Sanders, *supra* note 53, at 110 (stating environmental co-management can strengthen government-to-government relationships by increasing cultural understanding between parties, thereby increasing possibility of finding effective solutions to inter-jurisdictional environmental issues and reducing risk of litigation).

for permits that involve an activity that may result in a discharge into navigable waters must provide certification that the discharge will comply with CWA requirements, including tribal WQSs.<sup>134</sup> As part of certification, the EPA must notify a downstream tribe with approved WQSs of any proposed discharge that may affect the tribe's water quality, and the tribe may impose terms or conditions to ensure that the discharge complies with tribal standards.<sup>135</sup> Any terms or conditions imposed become a condition of the permit, enforceable by federal law.<sup>136</sup> If the tribe denies certification, the federal agency may not issue the license or permit.<sup>137</sup>

New or revised state-issued WQSs must also comply with tribal standards. If the state standards do not support downstream tribal requirements, the EPA may reject the proposed state program and promulgate federal standards.<sup>138</sup> In addition, under the Comprehensive Environmental Response, Compensation and Liability Act (CERLA), the EPA must clean up hazardous waste sites to a degree sufficient to achieve all applicable or relevant and appropriate pollution standards, including federally approved tribal WQSs.<sup>139</sup> Clearly, there are many rewards or benefits for tribes that gain TAS status. However, not all tribes can, will, or want to do so. The next section examines some of the internal questions tribes who wish to exercise their sovereign right to regulate WQSs must consider.

## V. WHAT CAN TRIBES DO?

*Even in law, doing nothing can have a limited life span if emergent circumstances require a response.*<sup>140</sup>

*When we talk today about sovereignty and self-determination, we mean that Indians must first decide for themselves how they wish to*

134. See 33 U.S.C. § 1341(a)(1) (2007). See also Indian Tribes; Eligibility for Program Authorization, 59 Fed.Reg. 64,339, 64,342 (Dec. 14, 1994).

135. 33 U.S.C. § 1341(a)(2), (b), (d) (2007).

136. *Id.* at § 1341(d). See also *City of Albuquerque v. Browner*, 97 F.3d 415, 422 (10th Cir. 1996) (citing *Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992) ("EPA's requirement that NPDES dischargers must comply with downstream States' water quality standards was a reasonable exercise of the agency's statutory discretion pursuant to [the CWA].")). *Accord* *Am. Rivers, Inc. v. F.E.R.C.*, 129 F.3d 99, 102 (2d Cir. 1997) (holding Federal Power Act requires incorporation of all state-imposed CWA certification requirements into federal hydropower license or relicense).

137. 33 U.S.C. § 1341(a)(1) (2007).

138. 40 C.F.R. § 131.10(b) (2009); *Id.* at § 131.10(c)(3).

139. 42 U.S.C. § 9626(a) (2007); 42 U.S.C. § 9621(d)(2)(A) (2007).

140. *Rodgers, Jr.*, *supra* note 80, at 817.



*use the earth, and then they will carry on the dialogue with the non-Indian world . . . .*<sup>141</sup>

The ability of tribes to control pollution and protect water quality is vital to the survival of Native nations. As discussed in the previous section, clean water is vital to tribes, not only on cultural, medicinal, and ceremonial bases, but it is also an important element of sovereignty.<sup>142</sup> One issue tribes wishing to adopt WQSs must consider is that, while tribes should have complete authority to codify and enforce their WQSs as “domestic dependent nations,” they may do so only to the extent allowed under federal law.<sup>143</sup> Therefore, tribes that develop independent WQSs for their reservations must meet federal minimum requirements under the CWA.<sup>144</sup> As with the Colville tribes, a tribe may request that the EPA “promulgate Federal water quality standards for waters on Indian Lands.”<sup>145</sup>

Other options for tribes are to adopt the standards of the state within which they reside, or to enter a cooperative agreement with the state under which state standards apply to Indian country.<sup>146</sup> These options have advantages, not the least of which is the potential of reducing jurisdictional disputes and the risk of litigation. However, while state WQSs must also meet federal minimum requirements, these standards may not be adequate to protect the quality necessary for tribal uses.<sup>147</sup> Environmental self-regulation is critical to tribal sovereignty, but as tribes consider whether to take primary responsibility for WQSs on the reservation, they must also take a hard look at their capacity to do so.

141. Statement of Indian U.S. Commissioner of Indian Affairs William Hallet, quoted in Grijalva, *supra* note 11, at 224.

142. See *City of Albuquerque v. Browner*, 97 F.3d 415, 418 (10th Cir. 1996).

143. *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831); see also 33 U.S.C. § 1151 (1948), *superseded by* Pub. L. No. 92-500, § 2, 88 Stat. 816 (1972).

144. See generally 33 U.S.C. § 1313 (2006) (describing federal water quality standards and methods by which to implement them); *Id.* at § 1370 (preserving state authority to regulate pollutants).

145. Water Quality Standards for the Colville Indian Reservation in the state of Washington, 54 Fed. Reg. 28,622, 28,622 (July 6, 1989) (to be codified at 40 C.F.R. pt. 131).

146. See generally, Grijalva, *supra* note 92 (discussing issues surrounding the implementation of the Clean Water Act by tribes).

147. *Id.* at 69 (arguing that state run regulatory programs in Indian country likely substitute state values for those of the tribe, striking at the core of tribal self-government and contravening congressional intent that tribes play primarily a regulatory role).

A. *Institutional Capacity*

*Treating the tribe as a state does not make it so.*<sup>148</sup>

*What really matters are not only [tribal government] rights and powers but the ability to put those rights and powers to work in effective, productive ways.*<sup>149</sup>

The TAS provision of the CWA requires a functioning tribal government with authority and capacity to create effective WQSs.<sup>150</sup> As part of the application process, tribes must submit detailed, descriptive documentation demonstrating jurisdiction over the area they wish to manage, as well as their technical and administrative qualifications and experience.<sup>151</sup> Not only can these requirements be offensive to

148. Rogers, Jr., *supra* note 80, at 820.

149. Stephen Cornell, Five Myths, Three Partial Truths, A Robust Finding, and Two Tasks, Address Before the Native American/Alaskan Native Economic Development Conference 14 (Apr. 19, 1994) (transcript available at [http://www.ksg.harvard.edu/hpaied/pubs/pub\\_131.htm](http://www.ksg.harvard.edu/hpaied/pubs/pub_131.htm)).

150. See 40 C.F.R. § 131.8(a)(1)–(4) (2009).

151. Specifically, the application must include the following:

- (1) A statement that the Tribe is recognized by the Secretary of the Interior.
- (2) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement should:
  - (i) Describe the form of the Tribal government;
  - (ii) Describe the types of governmental functions currently performed by the Tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population, taxation, and the exercise of the power of eminent domain; and
  - (iii) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.
- (3) A descriptive statement of the Indian Tribe's authority to regulate water quality. The statement should include:
  - (i) A map or legal description of the area over which the Indian Tribe asserts authority to regulate surface water quality;
  - (ii) A statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribes assertion of authority and which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority; and
  - (iii) An identification of the surface waters for which the Tribe proposes to establish water quality standards.
- (4) A narrative statement describing the capability of the Indian Tribe to administer an effective water quality standards program. The narrative statement should include:
  - (i) A description of the Indian Tribe's previous management experience which may include, the administration of programs and services authorized by the Indian Self-Determination and Education

Native nations, they also, depending on their regulatory infrastructure, can be downright overwhelming.<sup>152</sup> However, officials at the Harvard Project on American Indian Economic Development at Harvard University (Harvard Project) and the Native Nations Institute for Leadership, Management, and Policy at the University of Arizona (NNI) believe that Native nations that reclaim power over their own affairs can dramatically improve community welfare.<sup>153</sup> By rebuilding the institutional capacity historically subjugated by federal law and policy, tribal governments can reduce dependence on the federal government and strengthen tribal sovereignty.<sup>154</sup>

Stephen Cornell and Joseph P. Kalt argue that federal Indian policy has created dependency among Native nations, such that tribes

---

Assistance Act (25 U.S.C. 450 et seq.), the Indian Mineral Development Act (25 U.S.C. 2101 et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

- (ii) A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations;
  - (iii) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;
  - (iv) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards;
  - (v) A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise; and
- (5) Additional documentation required by the Regional Administrator which, in the judgment of the Regional Administrator, is necessary to support a Tribal application.

40 C.F.R. § 131.8(b) (2009).

152. See Haudenosaunee Environmental Task Force Response, *Core Water Quality Standards for Indian Country Waters Without EPA-Approved Tribal Standards*, (2001) (on file with author) (stating tribal tenets, doctrines, and treaties already contain provisions covering designated uses of water bodies, narrative water quality criteria, and anti-degradation policies). Cf. Grijalva, *supra* note 92, at 67 (“Many tribes have no established environmental agency, administrative procedure laws, formal court systems, or other complementary governmental functions.”); Maria E. Hohn, *Determining Water Quality Standards on Tribal Reservations: A Cooperative Approach to Addressing Water Quality Under the Clean Water Act*, 11 U. DENV. WATER L. REV. 293, 309 (2008) (concluding that “tribes are not well equipped to address water quality issues on their own”).

153. See Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RES. J. 187, 193 (1998), reprinted at [http://jopna.net/pubs/jopna\\_2003-03\\_Sovereignty.pdf](http://jopna.net/pubs/jopna_2003-03_Sovereignty.pdf) (noting the link between institutional capacity and economic development).

154. *Id.* at 191.

have had to rely on “someone else’s institutions, someone else’s rules, [and] someone else’s models, to get things done.”<sup>155</sup> For instance, for many years the Lummi Indian Nation depended on the Bureau of Indian Affairs (BIA) to administer its water-related services, a situation that proved inadequate as water quality continued to degrade.<sup>156</sup> Under a tribal enabling ordinance in the Nation’s Code of Laws, the Lummi Tribal Sewer and Water District was established providing critical water and sewer infrastructure and services to all reservation residents, both Indian and non-Indian.<sup>157</sup>

Harvard Project and NNI research has revealed that effective governing institutions in Indian country share certain characteristics.<sup>158</sup> These include stable institutions and policies, fair and effective dispute resolution, separation of politics from business management, a competent bureaucracy, cultural match or legitimacy, and strategic orientation.<sup>159</sup>

### 1. *Stable Institutions and Policies*

Stable institutions and policies include formal and informal but established practices that dictate how a tribe relates to its members and to outsiders, how rights and powers are distributed, and the rules by which all of the above operate.<sup>160</sup> For instance, in 1982, the Confederated Salish and Kootenai Tribes of the Flathead Reservation

155. *Id.* at 195–96 (1998). See also Jane Marx et al., *Tribal Jurisdiction Over Reservation Water Quality and Quantity*, 43 S.D. L. REV. 315, 322, 316 (1998) (“regulation of reservation water quantity and quality is central to tribal self-government and cannot and should not be entrusted to others”).

156. The Harvard Project on American Indian Economic Development, *Honoring Nations: 2002 Honoree, Lummi Tribal Sewer and Water District*, available at <http://www.hks.harvard.edu/hpaied/hn/hn2002cleanwater.htm>.

157. *Id.*

158. STEPHEN CORNELL & JOSEPH P. KALT, RELOADING THE DICE: IMPROVING THE CHANCES FOR ECONOMIC DEVELOPMENT ON AMERICAN INDIAN RESERVATIONS 15 (Joint Occasional Papers on Native Affairs 2003), available at [http://jopna.net/pubs/jopna\\_2003-02\\_Dice.pdf](http://jopna.net/pubs/jopna_2003-02_Dice.pdf).

159. See Sanders, *supra* note 53, at 129–31. Cultural match refers to governing institutions matching community views about how authority should be organized and exercised; otherwise tribal government can lack legitimacy with the people it is supposed to govern. *Id.* Cornell and Kalt define strategic orientation as the ability of a tribe to change its thinking from reactive to proactive, from short-term crisis management to long-term sustainable solutions. STEPHEN CORNELL AND JOSEPH P. KALT, TWO APPROACHES TO ECONOMIC DEVELOPMENT ON AMERICAN INDIAN RESERVATIONS: ONE WORKS, THE OTHER DOESN’T 16 (Joint Occasional Papers on Native Affairs 2006), available at [http://jopna.net/pubs/jopna\\_2005-02\\_Approaches.pdf](http://jopna.net/pubs/jopna_2005-02_Approaches.pdf).

160. CORNELL & KALT, *supra* note 158, at 17.

created its Natural Resources Department to maintain the integrity of their streams and the high quality of Flathead Lake.<sup>161</sup> The department employs approximately 135 staff and, in 1988, established the Division of Environmental Protection to oversee WQSs, shoreline protection, air quality, solid and hazardous waste, non-point source, and wetlands programs.<sup>162</sup>

Flathead environmental activities include education and outreach programs, restorations projects, joint efforts with shoreline landowners, and partnering with the state of Montana to address nutrient enrichment in the lake.<sup>163</sup> Formal policies can include constitutions, codes, and procedures.<sup>164</sup> Informal practices are usually determined by the specific tribe's cultural standards of what is right, what is wrong, and how things should be done.<sup>165</sup>

## 2. *Dispute Resolution and Separation of Politics*

A fair and effective dispute resolution is often reflected by a strong and independent tribal judicial system.<sup>166</sup> Tribal governing institutions must show that claims and disputes, including disputes with the tribe itself, will be fairly dealt with and that they have an effective and responsive dispute resolution system.<sup>167</sup> In addition, Harvard Project research has shown that when business decisions are made according to political agendas or pressures, tribal businesses typically either fail or become a drain on tribal resources, preventing those resources from being used to their full advantage.<sup>168</sup>

## 3. *A Capable Bureaucracy*

According to Cornell and Kalt, one of the key elements for institutional success is management that gets the job done and done well.<sup>169</sup> In the 1950s, during the Termination period of federal Indian policy, the Coyote Valley Band of Pomo Indians was "both terminated

161. ENVIRONMENTAL PROTECTION AGENCY, EPA-823-R-06-007, CASE STUDIES IN TRIBAL WATER QUALITY STANDARDS PROGRAMS: CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION (2006), available at <http://www.epa.gov/waterscience/tribes/files/flathead.pdf>.

162. *Id.*

163. *Id.*

164. CORNELL & KALT, *supra* note 158, at 17.

165. *Id.*

166. CORNELL & KALT, *supra* note 153, at 197.

167. *Id.*

168. See CORNELL & KALT, *supra* note 158, at 33.

169. CORNELL & KALT, *supra* note 153, at 201.

by the U.S. government and . . . dispossessed [of their lands] when the Army Corp of Engineers flooded its original reservation to create Lake Mendocino.”<sup>170</sup> Decades later, after restoring their tribal rights and securing eighty acres of land for their current reservation, the Band formed the Coyote Valley Tribal EPA, a “youth-focused tribal program that enables [the Band and the regional EPA office] to partner in addressing water quality issues on the reservation.”<sup>171</sup>

The program “educates Pomo youth in environmental monitoring skills and provides summer and after-school jobs.”<sup>172</sup> By learning to respect and protect the environment, the Band’s youth are “increas[ing] confidence in their own abilities to act as citizens of a sovereign Indian nation” and “investing in their own futures and in the future of the Tribe.”<sup>173</sup> A capable bureaucracy can enable a tribe to assert control over natural resources and other areas that affect them.<sup>174</sup>

#### 4. *Cultural Match or Legitimacy*

Harvard Project research revealed that tribal governing institutions were more productive and effective when they fit with the tribe’s cultural norms and understandings.<sup>175</sup> When cultural match is high, these institutions are more likely to be respected and supported by the people they govern.<sup>176</sup> When cultural match is low, the institutions are often viewed as “toothless [and are] ignored, disrespected, and/or turned into vehicles for personal enrichment.”<sup>177</sup> Cultural legitimacy can be seen in a number of tribal environmental programs.

For example, the Mole Lake Band of the Lake Superior Tribe of the Sokaogon Chippewa Community has designed uses that include “all Tribal Waters for cultural, subsistence, spiritual, medicinal, ceremonial, and aesthetic purposes . . . ecologically associated with

170. The Harvard Project on American Indian Economic Development, *Honoring Nations: 2002 Honoree, Coyote Valley Tribal EPA*, available at [http://www.hks.harvard.edu/hpaied/hn/hn\\_2002\\_epa.htm](http://www.hks.harvard.edu/hpaied/hn/hn_2002_epa.htm).

171. *Id.*

172. *Id.*

173. *Id.*

174. Cornell & Kalt, *supra* note 153, at 201. The need for a capable bureaucracy is evidenced not only for TAS applications. For example, when a tribe receives a state or federal request for certification regarding proposal discharges that might affect reservation waters, the failure to act on the request within a one year constitutes a waiver of certification. 33 U.S.C. § 1341(a)(1) (2006).

175. Cornell, *supra* note 149, at 4.

176. Cornell & Kalt, *supra* note 153, at 202.

177. *Id.*

Tribal Waters.”<sup>178</sup> Also, for the last decade the Oneida Tribe of Wisconsin has been reacquiring traditional land, taking unsuitable farmland out of production, buffering waterways, restoring wetlands, and enhancing trout stream habitat.<sup>179</sup> This protection of water quality would not have happened without the support of the Oneida Nation Farm, which must agree to take the land out of production, and the Oneida Land Commission, which must also approve the land use and the reduction of leasable acreage.<sup>180</sup> Unless there is a match between the tribe’s culture and its institutions, tribal government cannot develop strategic, long-term solutions to the tribe’s problems.<sup>181</sup>

### 5. *Strategic Orientation*

Tribal governments should identify long-term objectives, including the steps and resources necessary to achieve them.<sup>182</sup> The Navajo Nation Environmental Protection Agency (NNEPA) developed a long-range plan for obtaining TAS status and to gain primacy for as many environmental programs as possible.<sup>183</sup> To obtain TAS status, NNEPA focused on “developing comprehensive statutes and regulations, . . . establishing inventories, acquiring information on program issues, and obtaining training for staff.”<sup>184</sup> In another example, the Oneida Tribe showed its commitment to environmental protection by providing critical funding from gaming revenue to pay for the restoration of clear water and other natural resources.<sup>185</sup>

178. Sokaogon Chippewa Community Water Quality Standards, § 151.11(1) (Jan. 26, 2005) *available at* [http://www.epa.gov/waterscience/standards/wqslibrary/tribes/chippewa\\_5\\_wqs.pdf](http://www.epa.gov/waterscience/standards/wqslibrary/tribes/chippewa_5_wqs.pdf).

179. Hill-Kelley, *supra* note 81, at 22.

180. *Id.* at 23.

181. CORNELL & KALT, *supra* note 158, at 9–10.

182. IAN W. RECORD, WE ARE THE STEWARDS: INDIGENOUS-LED FISHERIES INNOVATION IN NORTH AMERICA 53 (Joint Occasional Papers on Native Affairs 2008), *available at* [http://jopna.net/pubs/JOPNA\\_2008\\_01\\_web.pdf](http://jopna.net/pubs/JOPNA_2008_01_web.pdf). *See also* Marx et al, *supra* note 155, at 380 (concluding that “the most significant impediment and constraint facing tribes in twenty-first century will be obtaining the essential resources—financial and technical—to carry out [environmental programs]”).

183. Jill Elise Grant, *The Navajo Nation EPA’s Experience with “Treatment As A State” and Primacy*, 21 NAT. RESOURCES & ENV’T 9, 9–10 (2007). NNEPA believed that the TAS provisions created a unique opportunity to assert tribal sovereignty and that EPA implementation was not providing the desired degree of environmental protection. *Id.*

184. *Id.* at 9.

185. *See* Hill-Kelley, *supra* note 81, at 22 (noting that, because the money could have gone to health care, education, community infrastructure, or other essential

As tribes consider taking responsibility for clean water on the reservation, they must evaluate their internal infrastructure.<sup>186</sup> Does the tribe have an established environmental agency? Has the tribe enacted a comprehensive water code? If so, does the tribe have the ability to effectively enforce it? What happens if a tribal government-owned business violates WQSs?<sup>187</sup> Where will financing and other necessary resources come from? These are just some of the questions that must be answered by tribes who wish to successfully regulate clean water. Building infrastructure is not an easy task. However, for many tribes the challenge may be worth the risks.

## VI. CONCLUSION

*Respect is not demonstrated by high-sounding proclamations that risk nothing. The true test comes when one's self interests are at stake.*<sup>188</sup>

TAS status and establishment of tribal WQSs offer significant advantages to Native nations, but they are not without risks and may not be the best solution for tribes seeking to assert sovereignty over natural resources and clean water. The CWA initially omitted tribes, but with the advent of the “self-determination” policy, the EPA was authorized to treat tribes in the same manner as a state for purposes of certain environmental regulation. However, tribes wishing to exercise their sovereign right to regulate clean water must have a functioning tribal government with authority and capacity to create effective WQSs.<sup>189</sup>

Once approval is gained, the TAS status brings with it many rewards including the ability to reduce “checkerboard” environmental jurisdiction within reservations, strengthen government-to-

---

tribal government priorities, the planning, implementation, and evaluation of environmental work was crucial to demonstrate that the money was used wisely).

186. See Tweedy, *supra* note 25, at 479 (stating that many tribes are precluded from attaining TAS status because tribes lack resources to devote to lengthy application process or because tribes cannot substantively meet standards).

187. See Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the Clean Water Act (CWA), 58 Fed. Reg. 67,966, 67,971–72 (Dec. 22, 1993). “A common situation among Indian Tribes is that the Tribe is both the regulator and regulatee. Such a situation could result in a conflict of interest if the EPA authorized the Tribal program because the Tribe would be regulating itself. The Agency believes that independence of the regulator and regulatee is necessary to best assure effective and fair administration of these programs.” *Id.*

188. Grijalva, *supra* note 11, at 292.

189. 40 C.F.R. § 131.8(a)(1), (2), (4) (2009).



government relationships, influence federal environmental regulatory policy and processes, and designate cultural, medicinal, and ceremonial uses for water.<sup>190</sup> These benefits must be balanced against the risks of promulgating WQSs because tribal governments applying for TAS status may be exposed to challenges that risk their sovereign ability to protect their lands and natural resources. Tribes opting to enact their own WQSs are often confronted with vague EPA support, non-Indian jurisdictional challenges, and the ongoing threat of changing federal law and policy.

Tribes who wish to successfully regulate clean water must critically evaluate their ability to do so. Tribal infrastructure must include stable institutions and policies, a fair and effective dispute resolution system, separation of politics from business management, a competent bureaucracy, cultural match or legitimacy, and strategic orientation. Tribal sovereignty is not just making the federal government live up to its trust and treaty obligations. It is recognizing that, regardless of stated policies of self-determination and government-to-government relations, self-determination operationally falls to the tribes who must assert sovereignty by performing the functions of effective governments.<sup>191</sup> Despite a history of colonization and assimilation, tribes can and are developing, implementing, monitoring, and enforcing their own environmental standards and playing a critical role in the sustainability of these resources for the benefit of Indians and non-Indians alike.

---

190. See *supra* Part IV.

191. JOSEPH P. KALT & JOSEPH WILLIAM SINGER, MYTHS AND REALITIES OF TRIBAL SOVEREIGNTY: THE LAW AND ECONOMICS OF INDIAN SELF-RULE 27 (The Harvard Project on American Indian Economic Development 2004), available at [http://jopna.net/pubs/jopna\\_2004-03\\_Myths.pdf](http://jopna.net/pubs/jopna_2004-03_Myths.pdf).